Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHZ Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding 800 MHz SMR	)	

COMMENTS OF LOUISVILLE TWO-WAY RADIO

John A. Prendergast
Gerard J. Duffy
Blooston, Mordkofsky, Jackson
and Dickens
2120 L Street, N.W.
Washington, D.C. 20037
(202) 659-0830

Dated: September 29, 1995

TABLE OF CONTENTS

SUMMARY

Louisville Two-Way Radio (Two-Way) urges the Commission to reject its September 18, 1995 proposal to auction previously licensed and operational 800 MHz SMR channels in the "upper band," and to order mandatory relocation of incumbent licensees therein.

Two-Way and other existing licensees received inadequate notice of the Commission's September 18, 1995 meeting in Washington, D.C., and have not had an adequate opportunity to participate in the current round of further comments.

The auction proposal inappropriately exceeds the Commission's authority under Section 309(j) of the Act to auction initial licenses and construction permits. It is also impracticable, particularly because it will disrupt local SMR services needed by small businesses and violate the reasonable expectations of existing SMR licensees, while adding unnecessary further wide area wireless services to a market already crowded with regional cellular, broadband PCS and 900 MHz SMR services.

Should the Commission proceed with the proposed 800 MHz SMR auctions, it should not depart from its tentative conclusion not to subject incumbent local SMR systems to "mandatory relocation" to non-available "low band" or General Category channels. If the Commission, for any reason, requires mandatory relocation, it should furnish existing SMR licensees and their customers with at least the same level of protection afforded to OFS licensees in Section 94.59(c) of its Rules.

Finally, rather than permitting Nextel or other entities to obtain all 200 "upper band" channels in various BEAs, the Commission should reserve the 60-channel band and/or the 20-channel band for incumbent licensees that were in operation prior to September 1, 1995.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHZ Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding 800 MHz SMR	)	

COMMENTS OF LOUISVILLE TWO-WAY RADIO

Louisville Two-Way Radio (Two-Way), by its attorneys, hereby submits its comments in response to what it believes to be some of the issues and questions raised by the Wireless Telecommunications Bureau (Bureau) during the course of a meeting held in the Commission's Washington, D.C. offices on September 18, 1995.

INTRODUCTION

Two-Way is a small business which operates trunked Specialized Mobile Radio Service (SMR) stations in the 800 MHz band in Louisville, Lexington, and nearby areas of Kentucky and Indiana. Most of Two-Way's customers are also small businesses such as taxi services, towing companies, medical clinics, heating and air conditioning providers, construction firms, painters, farmers, realtors, and security firms. These customers generally take dispatch service on 3-to-10 mobile units, and use the service to maintain contact with their employees and vehicles as they operate

within the local area.

INADEQUATE NOTICE AND OPPORTUNITY TO PARTICIPATE

As a threshold matter, Two-Way has not been afforded adequate notice and opportunity to participate in the present portion of the rulemaking. The Bureau's Public Notice ("Wireless Telecommunications Bureau Invites Interested Parties To Attend Meeting Regarding Proposals For Wide-Area Licensing Of And Competitive Bidding Rules For The 800 MHz Specialized Mobile Radio Service") was dated Tuesday, September 12, 1995, but did not become widely available to the public until Wednesday, September 13, 1995. This two-or-three business day "notice period" was simply too short for Two-Way's management to complete pending tasks, and make arrangements for a representative to travel to Washington, D.C. by Monday, September 18, 1995. Hence, Two-Way did not have a fair or adequate opportunity to attend the Bureau's meeting.

Moreover, to date, the Bureau has released no Public Notice or other document describing the September 18, 1995 meeting, and listing the specific questions and proposals on which the Bureau desires additional comment by September 29, 1995. A member of Two-Way's Washington, D.C. lawfirm was present at the Bureau meeting on behalf of other clients, and took some notes during the Bureau's presentation. However, he was not aware until the end of the meeting that the Bureau did not plan to issue a Public Notice setting forth in full detail its questions and proposals for further comment. Therefore, Two-Way does not believe that it has a complete listing of these questions and proposals that are

critical to the future of its existing business, nor that it has been afforded a fair opportunity to address them.

THE AUCTION OF WIDE AREA SMR LICENSES ON TOP OF LOCAL SMR LICENSES IS UNAUTHORIZED

Two-Way believes that Congress authorized the Commission to employ competitive bidding only for initial licenses and construction permits, 47 U.S.C. §309(j)(1), and not for fully and previously licensed spectrum blocks. The Commission itself has expressly excluded from auctions all license renewal applications and most license modification applications (with the exception of those proposing modifications so major as to dwarf previously authorized facilities). 47 C.F.R. §1.2102(b)(1) and (2); Second Report And Order (PP Docket No. 93-253), 9 FCC Rcd 2348, 2355 (1994).

The policy reasons for this exclusive focus upon initial licenses are clear. Congress wanted to permit "the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays," 47 U.S.C. §309(j)(3)(A), not to eliminate, degrade or disrupt existing services being enjoyed by the public. Likewise, Congress wanted to promote "economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses," 47 U.S.C. §309(j)(3)(B) -- not to allow well-financed auction participants to acquire from the Commission the rights to frequencies already being used by small businesses, or to force such small businesses to relocate their facilities and/or curb their future growth.

The Commission has expressly recognized that "[a]t present,

the 800 MHz SMR service is substantially licensed in most markets." Eligibility for the Specialized Mobile Radio Services (GN Docket No. 94-90), 9 FCC Rcd 4405, 4406 (1994). A 1994 study by the American Mobile Telecommunications Association (AMTA) and the Industrial Telecommunications Association (ITA) found that 800 MHz SMR frequencies were then depleted or nearly depleted in 200 of the top 300 markets. For example, AMTA/ITA determined that only eight 800 MHz band SMR channels were then available within 70 miles of the 50 largest cities in the United States. In markets 51 to 100, they found that 36 cities had no 800 MHz SMR frequencies available. Land Mobile Radio News, October 7, 1994, p. 6.

Two-Way is familiar with the fully licensed status of 800 MHz SMR service in the Louisville-Lexington area. Because there have been no available channels for several years, the Commission has maintained long waiting lists for 800 MHz SMR channels in the Louisville area. See e.g., Public Notice (Private Radio 800 MHz Radio Systems Application Waiting List), Mimeo 43004, released May 27, 1994.

Hence, initial licenses for virtually all of the allocated 800 MHz SMR spectrum have been granted previously by the Commission, and the vast majority of such licensed facilities have been constructed and placed in operation by Two-Way and others in detrimental reliance upon these license grants. Whereas the Commission clearly has the authority to assign via competitive bidding those few 800 MHz SMR channels remaining available in scattered markets as well as SMR channels becoming available in the

future due to automatic license cancellations for untimely or improper construction, it does not possess authority under the clear and express wording of new Section 309(j) of the Act to auction the vast majority of 800 MHz SMR spectrum that has long been licensed and operational. This is true whether the Commission directly auctions existing SMR licenses, or whether it superimposes "wide area" licenses for Bureau of Economic Analysis (BEA) areas over such existing SMR licenses.

THE AUCTION OF WIDE AREA SMR LICENSES ON TOP OF EXISTING LOCAL SMR LICENSES IS HARMFUL

At paragraph 13 of its Further Notice Of Proposed Rulemaking herein, the Commission recognized that "the large number of SMR systems already licensed in the 800 MHz band creates complications for converting to a new regulatory regime." In fact, the super-imposition of the tentatively proposed BEA auction plan upon the fully licensed, existing local 800 MHz SMR service will cause massive injury and service disruptions for existing licensees without any perceptible benefits.

Neither the Further Notice Of Proposed Rule Making nor the Bureau's September 18 presentation provided any indication that the Commission has conducted any studies to determine the nature and extent of the local SMR services being provided at present on the "upper 200" band, much less the alternatives available for the continuation and expansion of these existing services if the Commission adopts its proposed new auction/licensing plan.

Two-Way, like other local SMR operators, has expended substantial time and resources in developing its existing services

and customer base in reliance upon the Commission's long-established SMR licensing rules. Specifically, Two-Way has constructed its Louisville and Lexington area SMR systems and marketed its dispatch services upon the assumption that it would be able to renew its licenses and expand its facilities if it continued to provide quality service to the public in compliance with the Commission's rules.

In Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd 7378, 7389-90 (1994), the Commission held that pending applications for unserved cellular areas would be processed pursuant to the lottery procedures in effect when they were filed, and not under subsequently authorized auction procedures. In reaching this decision, the Commission emphasized the preservation of the legitimate expectations of the applicants that had reasonably relied upon its prior lottery procedures. It stated that "the applicants' business plans did not take into account the additional expenditures that they would incur if licenses were to be awarded by competitive bidding" and that "existing applications for cellular unserved areas provide no indication that the applicants have any interest at all in participating in auctions." Id.

What is true of the expectations of mere applicants for cellular fill-in licenses is far more true of the expectations of existing local SMR licensees. Two-Way and many others applied for, obtained, constructed and placed into operation their existing SMR licenses long prior to the Commission's July 26, 1993 pre-auction

application grandfathering date. In so doing, they expended tens and hundreds of thousands of dollars in reliance upon the Commission's existing SMR licensing rules -- far more than the cellular fill-in applicants for which the Commission expressed concern in Implementation of Section 309(j) of the Communications Act, supra. Yet, the Commission, to date, has shown little concern for the expectations and investments of local SMR licensees or their predominately small business customers. Rather, if adopted, the Commission's proposed superimposition of wide-area BEA licenses and mandatory relocation of existing licensees will retroactively change the existing SMR licensing rules in an abrupt and unduly burdensome manner that violates minimum agency procedural requirements. See Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); Williams Natural Gas Co. v. FERC, 3 F.3d 1544 (D.C. Cir. 1993).

Moreover, as indicated above, the recent AMTA/ITA study as well as Two-Way's direct experience in the Louisville-Lexington area, indicate that there are very few "white areas" remaining in the 800 MHz SMR service, and virtually none within significantly populated areas. Hence, not only is there little or no unoccupied 800 MHz SMR spectrum for incumbent SMR licensees to relocate, but also there is little or no incentive for new entrants to apply and bid for the proposed BEA licenses. Rather, the sole entity with an incentive to apply and bid for wide-area BEA licenses in most areas is Nextel, because the BEA license can be used to protect its existing local and wide area facilities. If, as is quite possible

in many BEAs, there are few or no other mutually exclusive applicants for the BEA licenses, the proposed "auctions" will become giveaways to Nextel and will not produce significant revenues for the U.S. Treasury.

Regardless of who obtains the BEA licenses in each area, there is no demonstrated need for the reassignment of over 70 percent (200 of 280 channels) of the allocated 800 MHz SMR spectrum for wide area wireless services. Rather, the existing needs for enhanced and wide area wireless services can be adequately met for the foreseeable future by the 50 MHz of spectrum presently assigned to cellular operators, by the 120 MHz of spectrum being auctioned during 1995 and 1996 to broadband Personal Communications Service (PCS) applicants, and by the 5 MHz of 900 MHz SMR spectrum being auctioned during 1995. Put another way, the Commission has previously licensed two cellular systems per MSA/RSA market; is presently licensing three-to-six broadband PCS systems on an MTA/BTA basis; and will soon license as many as twenty 900 MHz SMR systems on an MTA basis. Altogether, these existing and future allocations will provide the public with 6-to-26 wide area wireless services per market. Particularly before it is determined whether there is sufficient public demand to support the future PCS and 900 MHz systems, the Commission should not disrupt the service of hundreds of thousands of local small business SMR customers in order to create an additional one-to-three wide area 800 MHz SMR systems for Nextel.

Finally, the proposed auctions are not necessary to develop

and deploy enhanced or wide area 800 MHz SMR systems, where existing licensees want or need to construct them. Through waivers and acquisitions, Nextel is already creating such systems and is free to continue its efforts under the existing 800 MHz SMR regulatory structure. However, particularly when Nextel has not yet demonstrated that its prospective enhanced SMR services are technically feasible or desired by substantial portions of the public, it should not be permitted to transform its private desires to compete with cellular[1] and PCS carriers into a Commission reallocation of more than 70 percent of the existing 800 MHz SMR spectrum for unproven and unnecessary wide area use.

THE COMMISSION SHOULD NOT REQUIRE MANDATORY RELOCATION OF INCUMBENT LICENSEES

At paragraph 34 of its Further Notice Of Proposed Rule Making, the Commission tentatively concluded not to subject incumbent 800 MHz SMR systems to mandatory relocation. The Commission recognized that such mandatory relocation would impose significant costs and disruptions upon incumbent licensees and their customers. Even if comparable channels were available and all relocation costs were paid by the auction winner, the Commission found that mandatory relocation would create disruptions and disputes over the substitutability of channels, compensable costs, and related matters.

---

[1] In fact, to the extent that certain SMR operators wish to compete with cellular, Commissioner Quello has stated that SMR auctions "would have the effect of delaying or weakening the ability of [SMR] service providers to provide a competitive alternative to cellular." Land Mobile Radio News, October 7, 1994, p. 7.

However, the Bureau now appears inclined to require incumbent licensees in the "upper 200" 800 MHz band to relocate to alternative channels in the "lower 80" band or "general category" channels. Two-Way has not been given any (much less, adequate) notice of the evidence or arguments that have led the Bureau to reverse itself and depart from the Commission's previous, correct conclusion.

Two-Way submits that mandatory relocation of incumbent local SMR licensees is inappropriate and harmful for two basic reasons: (1) there are not enough alternative channels available; and (2) the time and travel necessary for reprogramming of customer equipment will disrupt the operations of the hundreds of thousands of small businesses that rely upon local SMR systems.

Unlike the situation in the "Emerging Technologies" rulemaking (ET Docket No. 92-9) where point-to-point microwave licensees could be relocated from the 2 GHz band to other sparsely used bands, there are virtually no frequencies available in the "lower band" or "general category" channels to accommodate relocations of incumbents from the 200 channels in the "upper band". It is Two-Way's information and belief that there are few, if any, such alternate channels available in the Louisville area. Considered alone, this critical absence of potential substitute channels requires rejection of the mandatory relocation proposal.

Also unlike the relocation of largely private, single-entity microwave licensees in the "Emerging Technologies" docket, the relocation of "upper band" SMR facilities will disrupt the daily

operations of hundreds of thousands of small business customers who depend upon existing local SMR services. The vast majority of these customers have purchased their own radio equipment. Even if the BEA licensee pays (as it should) the full cost of the modification or replacement of all customer equipment, the customers themselves will still be saddled with the inconvenience and costs of the employee and vehicle down-time and travel time necessary to make such equipment changes. Two-Way is certain that equipment modifications and replacements accompanying mandatory relocation will give rise to considerable complaints and dissatisfaction from its customers, and possibly some service terminations. These added disruptions and costs for small business customers are wholly contrary to the goals of the Congress to promote (rather than hamper) the development of small businesses via the auction process, 47 U.S.C. §309(j)(3), and should not be imposed.

CONDITIONS OF RELOCATION

If, for any reason, the Commission determines that mandatory relocation satisfies the public interest and its other statutory mandates and if the Commission sets aside sufficient 800 MHz channels for such mandatory relocation, incumbent 800 MHz licensees and their customers should receive protection and compensation at least equivalent to that afforded to 2 GHz Private Operational-Fixed Microwave Service (OFS) licensees occupying frequencies obtained by Broadband PCS licensees.

Incumbent 800 MHz SMR licensees should be given at least the

same two-year voluntary negotiation period and one-year mandatory negotiation period established for OFS licensees in Section 94.59(c) of the Rules. Because they have customers and customer equipment to worry about in addition to their transmitting systems, SMR licensees need at least as much time to plan and negotiate as OFS licensees who generally operate systems serving only their own organization.

If a negotiated relocation is not reached, the Commission should require mandatory relocation only under the following minimum conditions:

a. the BEA licensee pays all relocation costs, including engineering, equipment, construction, testing, FCC application fees, local fees, and any additional, recurring operating costs;

b. the BEA licensee pays all costs of adjusting, reprogramming or replacing customer equipment, including labor, parts, equipment, and reasonable compensation or credits (e.g., one month's free service) to pay for the travel and lost work time incurred by customers to make such changes;

c. the BEA licensee arranges and pays for (subject to the incumbent licensee's approval) all activities necessary to implement the replacement facilities, including engineering and cost analyses, frequency coordination, and identifying replacement frequencies. and preparing applications for them;

d. the BEA licensee arranges and pays for (subject to the incumbent licensee's approval) the construction of the replacement system, and the testing of it for comparability with the incumbent license's existing system;

e. the incumbent licensee is given access to the replacement facilities for a sufficient time prior to relocation to allow it to make adjustments, determine comparability, and ensure a non-disruptive change-over; and

f. if, within one year after relocation, the incumbent licensee shows that the new facilities are not comparable

> to the former facilities, the BEA licensee must remedy the defects or pay to relocate the incumbent licensee to its former or equivalent frequencies.

For purposes of mandatory relocation, "comparable" facilities: (a) should have the same number of frequencies and the same bandwidth as the incumbent licensee's existing facilities; (b) should be able to be located at the incumbent licensee's existing tower sites; (c) should provide reliable coverage (22 dBu contour) to at least the same area as the incumbent licensee's existing facilities; and (d) should not experience interference or signal reception problems in any areas where such problems are not presently encountered by the existing facilities.

Prior to relocation, the auction winner should be required to coordinate all facilities with incumbent licensees before constructing them. This should prevent service losses and disruptions to existing licensees and their customers from attempts by auction winners to force relocation under unfavorable terms or conditions by siting transmitters in a manner likely to interfere with incumbent facilities.

Two-Way reiterates its position that the Commission should reject mandatory relocation of existing 800 MHz SMR facilities due to the unavailability of "comparable" substitute frequencies and due to the service disruptions that will be suffered by incumbent licensees and their customers[2]. The foregoing compensation and

---

[2] If the Commission nonetheless adopts its 800 MHz SMR auction proposal without requiring mandatory relocation, Two-Way believes that it must significantly strengthen its proposed safeguards for incumbent 800 MHz SMR systems. Specifically, the Commission should: (a) permit incumbent licensees to expand into

conditions are presented as the minimum relief that should be afforded to incumbent licensees if the Commission can demonstrate that it has discovered or allocated sufficient 800 MHz frequencies to meet the relocation needs of such incumbent licensees.

ALTERNATIVE FREQUENCY ALLOCATION

Two-Way understands that the Bureau's September 18 proposal calls for the division of the "upper band" into a 120-channel block, a 60-channel block, and a 20-channel block, and places no limit on the aggregation of these blocks by a single entity in the same BEA.

Two-Way knows of nothing in the record of this proceeding which establishes that Nextel or any other entity needs more than 120 channels in any area to accommodate its wide-area service plans. Therefore, it believes that the Commission should hold that no entity or its affiliates can obtain more than one of the blocks in each BEA.

Moreover, Two-Way believes that the Commission should reserve the 60-channel block and/or the 20-channel block in each BEA for existing and operational 800 MHz SMR licensees as of September 1, 1995 which do not hold the 120-channel block in the BEA. This reservation will permit existing, local SMR licensees to continue to participate in the industry, and to obtain the additional capacity which has generally been denied to them during the past

---

unserved areas and to obtain additional "upper band" SMR channels; and (b) limit the right of BEA licensees to use spectrum and to add or move site locations within 70 miles of co-channel facilities without prior coordination with incumbent licensees.

few years. Partitioning options like those available to Broadband PCS licensees will permit local SMR licensees to share these blocks within BEAs where their customers do not need or want wide area service. Moreover, an Existing Licensee block could relieve some of the relocation and expansion problems that will result from the non-availability of "lower band" channels.

CONCLUSION

Two-Way urges the Commission to reject its tentative proposal to auction previously licensed and operational 800 MHz SMR channels in the "upper band." The proposal inappropriately exceeds the Commission's authority under Section 309(j) of the Act to auction initial licenses and construction permits. It is also impracticable, particularly because it will disrupt local SMR services needed by small businesses and violate the reasonable expectations of existing SMR licensees, while adding unnecessary further wide area wireless services to a market already crowded with regional cellular, broadband PCS and 900 MHz SMR services.

Should the Commission proceed with the proposed 800 MHz SMR auctions, it should not depart from its tentative conclusion not to subject incumbent local SMR systems to "mandatory relocation" to non-available "low band" or General Category channels. Finally, if the Commission requires mandatory relocation, it should furnish existing SMR licensees and their customers with at least the same level of protection afforded to OFS licensees in Section 94.59(c) of its Rules.

Respectfully submitted.
LOUISVILLE TWO-WAY RADIO

By _____
John A. Prendergast
Gerard J. Duffy

Blooston, Mordkofsky, Jackson
and Dickens
2120 L Street, N.W.
Washington, D.C. 20037
(202) 659-0830

Dated: September 29, 1995